

MEMORANDUM OF LAW

DATE: July 14, 1989

TO: Ralph Shackelford, Purchasing Agent

FROM: City Attorney

SUBJECT: Sole Source Procedure

This is in regards to your memo requesting legal guidelines in the area of sole source procurement. As you know, San Diego City Charter section 35 mandates advertising for sealed proposals for purchase of supplies, materials and equipment, and section 94 mandates competitive bidding in public works construction, reconstruction or repair. Courts have, however, found exceptions to such requirements:

As a general rule competitive bidding for public entities is a mandatory requirement as provided by statute, charter or ordinance However, there are certain well recognized exceptions to said rule. One exception is where the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and the advertisement for competitive bid would thus be undesirably impractical, or impossible It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where competitive proposals do not produce any advantage, or where it is practically impossible to obtain what is required and to observe such form, competitive bidding is not applicable.

Graydon v. Pasadena Redevelopment Agency, 104 Cal.App.3d 631, 635-636 (1980).

The courts have not articulated more definitive guidelines so the public entity, while having some flexibility, must be able to substantiate claims that competitive bidding would not be advantageous in order to proceed with sole source procurement.

In your memo you asked three (3) specific questions regarding sole source procurement. Questions number 1 and 2 were whether dollar limits should apply for sole source approvals, and if so, what should they be, and why. The cases that address this subject refer only to an exception to statute, charter or

ordinance, where competitive bidding would not produce any advantages to the public entity. We interpret this to be a narrow exception to charter requirements addressing only the competitive bidding process and not exempting notice to City Manager or Council. Therefore, we suggest that where competitive bidding may be excepted in a legitimate sole source situation, at least the same monetary limits regarding notice to City Manager and Council as in normal procurement be utilized regarding sole source procurement.

The draft revision of Administrative Regulation 35.10 (which is attached) sets more stringent monetary limits with regard to sole source procurement than with competitive bidding. Such limits are, of course, a policy matter, but would appear to be desirable given the subjective nature of sole source determination and possible necessity to prove good faith in any future litigation.

The third question you raised related to the area of test situations and the approval requirements therefore. You gave an example of a specialty product request from General Services/Building Division (copy attached). If there is a test product that truly fits the sole source criteria, then competitive requirements may not be required. However, in the example you gave, it may be necessary at some point in the process to issue either a request for proposals or bid specifications to ensure that the City's interest is best served. For example, an advertisement that the City wishes to test a product with certain capabilities may be appropriate. Test products should not automatically be afforded "sole source" status, nor should sole source test products be exempted from approval requirements.

Please let me know if I can be of further help.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

MKJ:jrl:150(x043.2)

Attachment

cc Severo Esquivel, Deputy City Manager

Laurie Schwaller

John Tomlinson

ML-89-71